

HONG KONG / JUDGMENT

HKSAR v. TAM WING MING

COURT

Court of Appeal

DECIDED

30 October 2008

CASE / FILE NUMBER

CACC474/2007

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj on nomacro Applicant

Before: Hon Stuart-Moore VP, Yeung JA and Saw J Date of Hearing: 30 October 2008 Date of Judgment: 30 October 2008 J U D G M E N T Stuart-Moore, macrobutton nomacro VP (giving the judgment of the Court):

Background

On 4 December 2007, the applicant was convicted after trial before V Bokhary J of trafficking in a dangerous drug, contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap. 134 and he was sentenced on the following day to 9 years imprisonment. He sought leave to appeal against both conviction and sentence. However, he has indicated today that he does not wish to proceed with his sentence application. Accordingly, that application is dismissed. The particulars of the count on the indictment alleged that the applicant: on the 18th day of May, 2007, outside Luen Tung Carpark, Mei Lai Road near Cheung Sha Wan Road, Cheung Sha Wan, Kowloon, in Hong Kong, together with LAW Ming-tim, unlawfully trafficked in a dangerous drug, namely 1,249.3 grammes of a powder containing 1,063.58 grammes of ketamine. The facts were straightforward. On 18 May 2007, at about 4.45 pm, the applicant's container vehicle was seen by police to stop in Mei Lai Road and a man boarded the vehicle. This was Law Ming-tim (Law) who is not only referred to in the charge but was also the subject of an Admitted Fact at the trial which reads:

4. Law Ming Tim was arrested by police on the pavement opposite the Esso Petrol Station, Mei Lai Road at about 4.45pm on 18th May 2007. At the time of his arrest he was holding a black travelling bag (hereby produced as Exhibit P1) which, upon search, was found to contain (inter alia) 5 plastic bags which contained suspected dangerous drugs. The Admitted Facts continued:

5. Those suspected drugs were analyzed by Leung Shuk Mei, a chemist in the Forensic Science Division of the Hong Kong Government Laboratory. Each of the 5 bags was found to contain approximately 250 grammes of powder containing Ketamine. The total weight of the powder was 1249.30 grammes. The total weight of Ketamine within the powder was 1,063.58 grammes. A copy of the Certificate from the Government Chemist is herewith produced as Exhibit P32.
7. At the date of seizure, the value of the drug if sold at street level to abusers was HK\$157,411. Law pleaded guilty on arraignment. The applicant was the driver of the vehicle which Law had got into. Law, at that time, was allegedly empty-handed but was, when he left the vehicle, carrying the black bag (exhibit P1) containing the drugs. Three mobile telephones were found in the cab of the applicant's vehicle but nothing which could be linked to ketamine was seen there. The contents of exhibit P1 were later photographed. It is apparent that there were no documents found inside that bag. Five small black plastic bags were inside, each of which contained about 250 grammes of ketamine. Also, inside the bag, police found a silver carrier bag which contained two of the 250-gramme bags of ketamine. On arrest, the applicant said that he did nothing except to deliver some documents. It was established in cross-examination that Law had told the police: The K chai (ketamine) is mine. That has nothing to do with others. Defence case The applicant gave evidence at his trial about the general nature of his work which included carrying items such as documents on an informal basis. When he did so, like other drivers in a similar situation, it was done on trust without any inspection of the package. On 18 May 2007, at about 3.30 pm, the applicant described how, after he had delivered goods to Dongguan, he reached the Huanggang Border Control where he met a driver-friend called Ah B whose vehicle was being detained by customs officials. Ah B asked the applicant if he was going to Kwai Chung and, when he replied that he was, Ah B requested him to deliver some documents to someone at Mei Foo. The applicant described this terminal as a ten-minute drive before Kwai Chung. He agreed to do this errand and Ah B then put the documents in the applicant's vehicle. These were taken from a bag which, he said, was not the same as exhibit P1. The bag Ah B put into the vehicle was, according to the applicant, the silver-coloured plastic bag. Ah B asked the applicant to give the item to his brother, Ah Tim. Ah B gave the applicant Ah Tim's number by entering it into his mobile telephone. Using this number, the applicant arranged to see Ah Tim at a petrol station. According to the applicant, he stopped opposite the petrol station at Mei Foo where he was expecting to meet Ah Tim and, within a minute, Ah Tim arrived at the cab door. He introduced himself and got into the cab. He was wearing a black top. Ah Tim had a black shoulder bag with him which the applicant thought was probably the same as exhibit P1. Ah Tim put this bag onto his lap and the applicant handed him the silver bag which Ah Tim put inside the black bag. Ah Tim also changed his shirt for a white and pink T-shirt and then left, holding exhibit P1 with the handle-straps over his shoulder. The applicant said that he was arrested after he had driven a short distance from the petrol station. Grounds of appeal Mr Richard Donald, for the applicant, advanced three grounds of appeal.

- (1) Co-defendant's guilty plea made known to the jury The 1st ground amounted to a complaint that the judge had allowed evidence to go before the jury of Law's plea of guilty to trafficking in ketamine, the subject of the indictment. This was done by means of an Admitted Fact as follows:
1. On the 24th day of August 2007 Law Ming Tim pleaded guilty to a charge of trafficking in the drugs the subject of the indictment in this case. Mr Donald suggested that knowledge on the part of the jury of this admitted fact might have led them to conclude that the applicant was also guilty of the offence having regard to the wording of the particulars of the count against him. In saying this, he sought to lend support to his argument by reference to HKSAR v Lo Wai-ming [2007] 3 HKLRD 191 which, as Mr Lee SC for the respondent was right to point out in his written submissions, was a case where prosecuting counsel had attempted to use inadmissible out-of-court statements made by a co-defendant to implicate the appellant. It had no relevance to the instant case. We say no more about this ground than to emphasize that it was the defence case that the drugs were never knowingly in the applicant's possession. The applicant was, on his case, an innocent dupe. He had been persuaded by someone called Ah B, who he had thought was a friend, into doing Ah B a favour only to find that he had been duped into acting as a courier for drugs. There was no dispute that Law (Ah Tim), collected dangerous drugs from the applicant. The whole purpose of defence counsel's decision to allow the jury to know that Law had pleaded guilty was part of a perfectly sensible tactical decision to ensure that the jury was aware that Law had taken the entire blame for this large quantity of ketamine when confronted by the police. This left the jury having to decide whether it had been established that the applicant had played a knowing part in the undoubted trafficking by Law in these drugs. Two other matters are worthy of note, both of which Mr Lee was right to have emphasized. First, when summing up, the judge directed the jury that: s guilty plea does nothing to prove the accused's guilt. Secondly, when dealing with Law's reply to the police that the K chai was his, the judge told the jury: Now, members of the jury, take that into account in the accused's favour, giving it such weight, if any, that you think it deserves. Mr Lee might also have argued that if there was anything in the point raised by Mr Donald, it needed to be treated as an attack on the competence of defence counsel. We have said enough already to indicate that no such criticism could be made of counsel representing the applicant in the court below. No prejudice was caused to the applicant through the jury being told that Law had pleaded guilty. On the contrary, this was a matter which assisted the defence. This ground was misconceived.
- (2) Omission of a direction to the jury that if the applicant's evidence was or might be true he should be acquitted. The 2nd ground of appeal raised a criticism of the summing up in that it was suggested that the judge failed to direct the jury that [they] could take into account any part of the applicant's testimony which [they] thought could or might be true. One of the authorities cited in support of this ground was HKSAR v Wong Wai-man and Ors (No. 2) [2003] 4 HKC 517. However, as this was a decision in regard to a fundamental misdirection to the jury to the effect that if they were not sure that what the defence witnesses were saying

was actually true then they had to disregard such evidence for all purposes, this decision had no application to the present case. As we have indicated already, there was little in the prosecution's case of any materiality which was in dispute apart from whether Law was empty-handed when he entered the cabin of the applicant's vehicle. The sole issue for the jury to decide, whichever way that dispute was resolved, was whether it had been proved that the applicant had knowledge of dangerous drugs in the cabin of his vehicle before Law took possession of the bag containing some or all of them. The applicant's defence was that he had acted in the belief that he was transporting documents as a favour for a friend. Plainly, if that assertion was true, or might have been, the applicant was entitled to be acquitted. The question for us, under this ground of appeal, is whether the judge, either in the words said to be missing from the summing up or by the use of a formula to the same effect, gave the jury a direction which made clear to them that the applicant was entitled to be acquitted if they were not sure whether his account might be true. The ground of appeal asserts that nothing was said to this effect. Mr Lee, in his written reply, conceded that the judge had not stated explicitly that the applicant was entitled to an acquittal if the jury thought that his testimony was true or might be true but he submitted that when the judge's directions were read together, it would have been abundantly clear to the jury that no inference of guilt could be arrived at if the applicant's account might have been a true one. The standard direction provided by the Judicial Studies Board in this regard contains a direction to the effect that if the defendant's account is true then, of course, he must be acquitted but he must also be acquitted if that account may be true. The passages which, taken in combination, Mr Lee submitted gave effect to this direction were, first, the directions on the burden and standard of proof: As for the burden of proof, it is upon the prosecution throughout. It never shifts. Under our legal system, in respect of any count against any accused, it is always for the prosecution to establish the accused's guilt. There is no burden on any accused to prove anything. That, members of the jury, is the burden of proof. I now turn to the standard of proof. It comes to this. Before you can convict, you must be satisfied so that you feel sure of the accused's guilt. Put another way, you must be satisfied beyond reasonable doubt of the accused's guilt before you can convict. If you are not so satisfied, then you must acquit. But if you are so satisfied, then you are entitled to convict. In proving its case beyond reasonable doubt, if it can, the prosecution can only rely on the evidence in this court. Nothing you have seen, heard or experienced outside court can ever adversely affect any accused person. Preconceived ideas have no place in a courtroom. Of course, jurors are expected to use their common sense. Go by the evidence. Do not speculate. Use your common sense. The second passage related to the approach to be taken by the jury to the drawing of inferences. The judge said: The drawing of inferences can also be done in a criminal case, subject to this: you cannot draw an inference against an accused unless it is based on facts of which you are sure and you are sure that it is the only reasonable inference. If an inference against the accused is based on facts of which you are sure and you are sure that it is the only reasonable inference, then you may draw that inference against the accused. And just as acts can be inferred and intent can be inferred, so can knowledge be inferred. Thinking that something is the only reasonable inference is the

same as being satisfied of it beyond reasonable doubt; in other words, being sure of it. The third passage Mr Lee relied upon in his reply was somewhat difficult to follow as it seemed neither to support his argument nor to have been a direction which would have given any help to the jury. If anything, we think it would have been somewhat confusing. It reads: You have just heard me use the expression accused. It is of course interchangeable with the expression defendant. They mean the same thing. In the course of this summing-up, I may use expressions such as accept, conclude, decide, find, think or believe and so on without repeating the expressions beyond reasonable doubt or so that you are sure . But you must remember always that no jury can accept, conclude, decide, find, think or believe and so on anything against an accused unless satisfied beyond reasonable doubt as to the correctness of such acceptance, conclusion, decision, finding, way of thinking or belief and so. Remember that. How this helped Mr Lee in his reply to this ground or the jury in their comprehension of their duties we are at a loss to understand and we would suggest, with respect, that such a direction should not in future be given. The jury had been given directions as to the burden and standard of proof and any jury must obviously be credited with sufficient intelligence to have understood this fundamental aspect of any criminal trial after they have, as here, been properly directed on the topic. The fourth passage relied on by Mr Lee was a direction given in the context of what was meant by unlawfully in the definition of trafficking. The judge said: So if you conclude beyond reasonable doubt that he did traffic in the dangerous drugs the subject matter of the count, then you may have no difficulty in concluding beyond reasonable doubt that such trafficking was done unlawfully. The fifth part of the summing up which Mr Lee relied upon was in relation to a summary of the defence case, helpfully given by the judge after she had summarised the applicant's testimony. The judge said: Now, members of the jury, the accused's case is that he did not traffic in any of the dangerous drugs which the police found in the black bag, Exhibit Pl. He says that part of the dangerous drugs in that bag had been handed to him by Ah B as documents, and the rest were carried into his vehicle by Law, whom he said had the black bag even before getting into his vehicle. The prosecution has called the evidence of police officers who told you that they saw that Law did not have the black bag before getting into the accused's vehicle but had it only when he got off the accused's vehicle. The prosecution's case is based on all the dangerous drugs in the black bag. If you do not feel sure that the accused trafficked in all of the dangerous drugs in the black bag, then you must acquit him. If you do feel sure that he trafficked in all of the dangerous drugs in the black bag, then you may convict him as charged, returning a verdict of guilty. On the defence case, the scenario, you may think, is this. Law, already carrying some of these dangerous drugs, went to meet the accused to collect the rest of these dangerous drugs, which the accused had been duped into bringing to Hong Kong in the belief that they were documents. [Emphasis added] This was followed shortly afterwards by the sixth direction relied upon by Mr Lee which was in these terms: As to whether Law had the black bag, Exhibit Pl, before entering the accused's vehicle, you have the accused's evidence that he did, and you have the evidence of the police officers that Law did not have the black bag when he entered into the vehicle but only had it when he left the vehicle. If you feel sure that the evidence of the police witnesses is true and

reliable and that the evidence of the accused is false, then you would be entitled to conclude - it is a matter for you - as follows. [Emphasis added] The seventh and last direction was set out in these terms: You are entitled to convict, if you see fit, on the basis of inferring guilt as the only reasonable inference in all the circumstances, including the value of the dangerous drugs. No accused has to prove anything. Has the prosecution, on the evidence which it has placed before you, discharged the burden of proving the accused's guilt beyond reasonable doubt? That is what the prosecution has to do, what it sets out to do, and what it now submits to you it has succeeded in doing. The decision is yours and yours alone as the sole judges of facts. You have to consider: has the prosecution proved beyond reasonable doubt the guilt of the accused or do you have a doubt on the matter? [Emphasis added] It is plain from the citations selected by Mr Lee that the easily understood formula, routinely used by judges in summings up where a defendant has given an explanation for his actions either during a trial or before it, to the effect that if what he says is or may be true he is entitled to be acquitted is absent. The question, therefore, is whether the repeated directions about where the burden of proof lay and as to the standard of proof which had to be attained if the prosecution was to succeed was a sufficient substitute. This could only be so if the jury had been made to understand in the clearest possible terms that if there was any doubt about the integrity of the prosecution's version of events, the applicant must be acquitted. This is usually achieved by the words of the specimen direction (see paragraph REF _Ref213143905 \r \p \h * MERGEFORMAT 25 above) which was unfortunately not given in the present case. This being said, the judge had used the plainest language to stress that if the jury did not feel sure that the accused trafficked in all of the dangerous drugs in the black bag they must acquit him and this served to emphasize the direction the judge had given earlier that if the jury were not satisfied of guilt they must acquit. We consider that it would have been preferable for the jury to have been given the standard direction as it is simple to understand and a time-honoured formula to describe the right approach to evidence given by a defendant. However, we are satisfied in the instant case that the judge had said enough to make it clear to the jury that if a doubt existed about the applicant's guilt they would have to acquit him. His account had been that he had no knowledge that drugs had been placed in the cab of his lorry. In explaining the law to the jury, the judge had said: If a person, acting as a courier in the drug trade, knowingly transports or delivers dangerous drugs for another person, knowing that they are dangerous drugs, he is trafficking in them. The jury also knew that if any doubt existed as to the allegation of trafficking in dangerous drugs, they must acquit. Whilst there was the additional direction to which we have referred that the judge could have given in order to drive home the message, we do not consider that its omission in these circumstances was a material one. (3) Strong comment in the summing up The 3rd ground advanced by Mr Donald was that the judge had, he submitted, caused injustice to the applicant by using impermissibly strong comments. One particular example he cited was: Is it at all realistic to think that dangerous drugs of such value would ever be entrusted to an innocent person, a dupe who did not know their nature? We do not propose to dwell on this ground or on this example or others given by Mr Donald. The judge had informed the jury in the course of her directions on the law that if she seemed to express a view about the facts,

the jury should reject her view if it did not appeal to them. The particular comment, which was highlighted by Mr Donald in this ground of appeal, stood out as an obvious point in the case which it was clearly right the jury should consider. Other minor complaints under this ground do not need to be set out as they carried the matter no further forward. There is no substance to this ground. Conclusion on conviction We shall give leave on the 2nd ground but, treating the hearing as the appeal, we dismiss the appeal. The two other grounds should never have been raised. They had no merit whatever. (M. Stuart-Moore) macrobutton nomacro Vice-President (Wally Yeung) Justice of Appeal (Darryl Saw) Judge of the Court of First Instance Mr Robert S K Lee, SC, SADPP and Ms Kathie Cheung, SPP, of the Department of Justice, for the Respondent. Mr Richard Donald, instructed by Messrs Henry H C Wong & Co, assigned by Director of Legal Aid, for the macrobutton nomacro Applicant PAGE - PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk 1udk G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V "0 "0 "0 "0 "0! "0" "0# "0\$ "0% "0& "0' "0(i\$&`G Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=63137
CASE PAGE	https://chat.esheria.ai/case-law/hong-kong/hksar-v-tam-wing-ming-2008

Prepared on 26 October 2026 · Esheria